# Petition

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# 81-248

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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WAYS & MEANS, INC., a corporation,
and LABCON, INC., a corporation,

Plaintiffs-Appellants,

v.

IVAC CORPORATION, a corporation,

Defendant-Appellee

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PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

---

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## QUESTION PRESENTED

The question presented is whether a seller of two tied products, having a substantial share of the relevant market in both products, can avoid antitrust liability by offering the two products separately at prices 29 percent to 41 percent higher, such that a buyer's rational choice is to purchase the tied package?

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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this appeal on February 2, 1981.

## OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported officially at 638 F.2d 143 (1981), and unofficially at 1980-81 Trade Cas. ¶ 63,849. The opinion of the district court is reported officially in 506 F. Supp 697 (N.D. Cal. 1981) and unofficially in 1979-2 Trade Cas. ¶ 62,734.

## JURISDICTION

The judgment of the court of appeals was entered on February 2, 1981. A timely petition for rehearing was denied on April 2, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

The question presented is whether a seller of two tied products, having a substantial share of the relevant market in both products, can avoid antitrust liability by offering the two products separately at prices 29 percent to 41 percent higher, such that a buyer's rational choice is to purchase

the tied package?

STATEMENT OF THE CASE

Petitioner filed a complaint in the District Court for the Northern District of California, in September, 1976, charging inter alia that the defendant manufacturer effectively prevented their competing with it by virtue of a tie-in sales program in violation of Section 3 of the Clayton Act, 15 U.S.C. §14 and Section 1 of the Sherman Act, 15 U.S.C. §1. There are two products involved in this case - electronic thermometers (tying product) and disposable probe covers (tied product). The electronic thermometer is a medical instrument used by doctors and nurses to take a patient's temperature. The disposable probe cover is a non-porous, rigid plastic sleeve placed over the thermometer probe and is discarded after taking each patient's temperature.

The Respondent IVAC CORPORATION ("IVAC") is a subsidiary of Eli Lilly & Company, which

manufactures and sells the leading electronic thermometer pursuant to various United States Letters Patent. In addition, IVAC manufactures and sells plastic disposable probe covers for use with its electronic thermometers.

Petitioners WAYS & MEANS, INC., and its sales subsidiary, LABCON, INC. (both herein referred to as "WAYS & MEANS"), manufacture and sell numerous molded plastic medical products, including disposable probe covers, for use with IVAC's patented electronic thermometers, but compete directly with IVAC in the sale of disposable probe covers for use on IVAC's patented thermometers.

Petitioners contended that IVAC's sales program is an illegal tie-in. If a customer purchases 15,000 disposable probe covers from IVAC, the patented electronic thermometer is "free". It is from 29 percent to 41 percent cheaper for a doctor or hospital to purchase both thermometers and probe covers under IVAC's

tie-in sales program that it is to secure those items separately. As a result, in the four year period from 1974 to 1977, inclusive, over 86 percent of IVAC's sales were pursuant to the tie-in sales program. During this period, IVAC sold 776,879,000 probe covers (tied) pursuant to the tying arrangement with its electronic thermometers for a total revenue of over $30,000,000.00.

IVAC's tie-in sales program is entitled TSP for "Temerature System Program". Under the TSP program, a hospital contracts with IVAC to purchase 15,000 disposable probe covers per year for each thermometer acquired, and IVAC provides the electronic thermometer, as well as maintenance, free of charge. The two types of TSP contracts are (1) a one-year "soft copy" contract cancellable on 30 days' written notice, and (2) a one, two or three-year "hard copy" contract which is non-cancellable.[1]

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1. Footnote, see page 6

[1]In explaining the TSP cancellable contract, the Annual Report of IVAC makes it clear that one of the purposes of the program is "the elimination of competion".

> "With the thermometer, for example, a hospital is first offered IVAC's Temperature System Program (TSP) which provides all the necessary equipment, disposable probe covers and in-service training to handle all temperatures taken in the hospital for a year. The contract is cancellable by the hospital on 30 days' notice. After 120 days, the hospital is offered a non-cancellable contract to pre-purchase a 12-month supply of disposables. The hospital receives a quantity discount and eliminates the possibility of a price increase during the year.
>
> "IVAC's primary advantages in this 'cancellable to non-cancellable' sales strategy are the more rapid initial market penetration and the <u>elimination of competition</u> when the non-cancellable contract is signed. Presently, more than 70 percent of our customers convert to a 12-month contract after the 120-day 'trial' period. (Emphasis added.)

In addition to the TSP, there are two other IVAC sales programs: (1) Regular Sale, and (2) Lease Agreement. Under the regular sales program, electronic thermometers are sold at the current list price. Under the lease program, electronic thermometers are leased on 24 and 36 month leases at flat monthly rates, as shown on IVAC's current price list.

Based on 15,000 probe covers per year, which according to Respondent is the average number used by IVAC customers per year per thermometer, the Regular Sales program costs 37 percent more than the TSP program (29 percent more before IVAC raised its prices on October 1, 1976). Based on the same number of probe covers, the Lease Arrangement program costs 41 percent more than the TSP (33 percent more for the period before October 1, 1976). Accordingly, internal accounting reports show that in 1976 and 1977, the TSP accounted for 92 percent of IVAC's sales of probe covers.

In January, 1973, WAYS & MEANS began manufacturing and distributing probe covers for IVAC's thermometers in competition with IVAC's probe-cover operations. This was two years after IVAC had introduced the TSP program. WAYS & MEANS attempted to sell its probe covers to those few who purchased or leased IVAC thermometers outside the TSP program. Depite significantly lower prices, it succeeded only to a very limited extent in competing with IVAC; for example, it made a successful bid in 1975 to the Veterans' Administration.

In 1976, IVAC had more than 80 percent of the electronic thermometer market, due in part to its numerous patents. At the time, 70 percent to 75 percent of the temperatures taken were read with conventional glass thermometers, while the remaining 25 percent to 30 percent were taken with electronic thermometers.

Based on IVAC's dominant share of the

electronic-thermometer market, and the fact that the great majority of customers accepted the tie-in sales program, WAYS & MEANS moved on March 10, 1978 for summary judgment on the issue of liability under Section 1 of the Sherman Act. IVAC filed a cross-motion for summary judgment. On April 21, 1978, the District Court denied both motions.

On December 2, 1978, IVAC filed a second motion for summary judgment, claiming that its marketing practices were not illegal tying arrangements. On December 28, 1978, the District Court ruled in IVAC's favor, agreeing that "there does not exist a tie-in of two products by which the sale of one is conditioned upon acceptance of the other." Ways & Means, Inc. v. IVAC Corp, 506 F.Supp. at 703.

Rather than acknowledging the fact urged by WAYS & MEANS that a substantial number of customers accepted the tie-in, the district court reversed the traditional analysis

and declared the tie-in legal on the grounds that some customers purchased the two products separately. The district court concluded:

> "...that plaintiff's have failed to produce sufficient evidence from which any inference of unfairness can be drawn with respect to defendant's pricing policy. Most glaring is the undisputed fact that approximately 25 percent of all purchases of electronic thermometers were made outside the TSP program. This fact suggests that, a fortiori, separate purchase of thermometers and probe covers was a reasonable alternative."
> Id. 506 F. Supp. at 702.[2]

---

2. A second reason for the district court's opinion was that according to the district court it was cheaper to purchase defendant's thermometer and plaintiff's probe cover. Petitioners challenged this below as factually and legally incorrect. This justification for the district court's summary judgment was apparently rejected by the panel of the Court below since the PER CURIAM opinion states that this mathematical error was not determinative to the decision. (See App. A.)

For the same reasons, the district court also found against WAYS & MEANS on its claims under Section 2 of the Sherman Act.

In a one-paragraph opinion issued per curiam on February 2, 1981, the Ninth Circuit Court of Appeals adopted without comment the District Court's theory that a tie-in is justified if some customers reject the tie. (See App. A.) According to the court, the same reasoning entails that "IVAC's behavior was neither an unreasonable restraint of trade nor predatory." (Id.)

The court concluded by washing its hands of the District Court's decision concerning Petitioners' damage study. That study was conducted for WAYS & MEANS by C. Michael Davies, a medical research economist at the Stanford Research Institute (SRI) International, Meno Park, California.

## REASONS FOR GRANTING THE WRIT

The Court of appeals has decided a question of much concern to the business community, as well as the courts, regarding the application of an antitrust doctrine of tie-ins. It decided the issue in such a manner that it squarely conflicts with the decisions of the other federal courts of appeals; indeed, the decision conflicts with the decisions of other panels of the Ninth Circuit Court of Appeals. The courts of appeals have held that only if separate components are available to the customer on as favorable terms as the tie-in arrangement is the arrangement non-coercive, and hence not illegal. See Advance Business Systems & Supply Co. v. SCM Corp., 415 F.2d 55, 62 (4th Cir. 1969), cert. denied, 397 U.S. 920 (1970); American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272, 283 (2d Cir. 1967). Prior to the decision below,

this principle had been consistently followed in the courts of appeals.

If the decision is allowed to stand, confusion will result concerning whether a tie-in is justified in cases where a substantial number of boyers are burdened with the tie-in, but some buyers reject the tie-in favor of seprately-available components. Businessmen as well as the courts will no longer have a realtively clear test for evaluating the legality of a tie-in arrangement. Uncertainty as to the court's probable determination regarding acceptability of a tie-in will could the businessman's calculation of risk, thus unnecessarily chilling legitimate use of this form of business arrangement. The courts cannot allow the matter of what constitutes illegal tying to become a question of second-guessing the way one court of appeals will decide rather than another.

This Court should grant certiorari to eliminate the conflict of decisions among

the courts of appeals, to clarify the continuing authority of its prior decisions, and to remove the incentive for further disruption of standards relied upon by the business as well as the legal community.

## I. THE COURT OF APPEALS DECISION IS IN CONFLICT WITH THE DECISIONS OF THE COURTS OF APPEAL IN OTHER CIRCUITS AS WELL AS ITS OWN DECISIONS.

The court of appeals agreed with the district court that the TSP progam did not consitute an illegal tying arrangement. (App. A.) This is notwithstanding that (1) IVAC's TSP contracts constitute a sale of electronic thermometers on condition that the customer purchase its disposable probe covers as shown by both the TSP contract terms and the excessive cost of the lease or sale alternatives; (2) IVAC has monopolistic economic power in the tying product market (IVAC electronic thermometers),

as demonstrated by its patents, the substantial number of customers utilizing the TSP program and IVAC's 80 percent market share of all electronic thermometers; and (3) A substantial volume of commerce in the tied product (disposable probe covers for IVAC thermometers) has been restrained. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594,608-9 (1953); Northern Pac. Ry. Co. v. United States, 356 U.S. 1,6 (1958); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U. S. 495 (1969) on remand, 452 F. 2d 1095 (6th Cir. 1971), cert. denied, 406 U. S. 919 (1972), 523 F. 2d 691 (1971), rev'd., 429 U. S. 610 (1977).

The decision below deviates from an otherwise consistent line of cases in the federal courts of appeals holding that an element of the test for an illegal tie-in

is whether a substantial amount of commerce in the tied product is restrained by the sale policy, regardless of whether some customers reject the tie. In Advance Business Systems & Supply Co. v. SCM Corp., supra, 415 F.2d at 62, Fourth Circuit Court of Appeals stated:

> "Tie-ins are non-coercive, and therefore legal, only if the components are separately available to the customer on a basis as favorable as the tie-in arrangement."

As a well regarded commentator recently stated, if the "separate price for the tying product was so high that the buyer's only rational choice was to purchase the tied product," the tying arrangement is illegal. Austin, The Individual Coercion Doctrine In Tie-In Analysis: Confusing And Irrelevant, 65 Cal. L. Rev. 1143, 1164 (1977). See, e.g., Hill v. A.T.O., Inc. 535 F.2d 1349, 1355 (2d Cir. 1976).

In the SCM case, the Fourth District upheld the finding by the district court that notwithstanding the availability of SCM copiers (tying product) for purchase separately from SCM paper (tied product), the principal purpose of the copy-service sales program was to force the purchase of SCM paper. Advance Business Systems & Supply Co. v. SCM Corp., supra, 415 F.2d at 61-62. The district court said regarding this point:

> "SCM then argues that even if the rental of machines and the sale of paper are recognized as separate items, they may be offered as a combination at a unit price, if they are also available separately, and that since March 1967 Model 55 has been available for purchase separately without any requirement that the purchaser buy SCM paper. It has never, however, been available for rental without the requirement, the principal purpose of which is to force the purchase of SCM

> paper. The court concludes that the availability of the Moden 55 for purchase does not prevent the copy service agreement from being an illegal device, in unreasonable restrain of trade, unless and until the Model 55 is also offered for rental on a reasonable basis without the requirement that SCM paper be purchased." Advance Business Systems v. SCM Corp., 287 F. Supp. 143, 156 (1968).

In the case at bar, IVAC's separately priced products cost 29 percent to 41 percent more than its tied package to the fact that a customer could have purchased the tied product elsewhere for a much lower price cannot legalize an otherwise illegal tying arrangement. Under the standard in the Fourth Circuit expressed in the SCM case, the decision below would be improper as a matter of law.

Indeed, the decision below conflicts with the clear statement of the law laid

down by the court of appeals in a line of cases consistent with the Fourth Circuit's decision in SCM. See Moore v. Jas. H. Matthews & Co., 550 F. 2d 1207 (9th Cir. 1977); Siegal v. Chicken Delight, Inc., 448 F. 2d 43 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972).

In Moore v. Jas. H. Matthews & Co., supra, 550 F. 2d at 1217, the court said:

> "The fact that each purchaser of a cemetery lot was not absolutely required to buy a marker is an argument we rejected in Siegel, supra. There we refused to accept appellant's individual coercion theory and we were not troubled by the fact there was no evidence to show that each of the 650 franchisees had been required to purchase the equipment, mixes, and packaging. A showing of an onerous effect on an appreciable number of buyers coupled with a demonstration of sufficient economic power in the tying market is sufficient to demonstrate coercion."

An appreciable number of buyers have accepted the TSP contract. Over 1,214 TSP contracts have been written. As the Ninth Circuit Court of Appeals stated in Moore:

> "[Our] reading of the Supreme Court's opinion supports the view that coercion may be implied from the showing that an appreciable number of buyers have accepted burdensom terms, such as a tie in, and there exists sufficient economic power in the tying product...". Id. 550 F. 2d at 1217.

Moreover, IVAC possesses appreciable market power in the tying product, electronic thermometers. That WAYS & MEANS effectively raised a material issue of fact on this matter sufficient to defeat IVAC's summary judgment motion is clear based on the following undisputed facts: (1) IVAC possesses patents on the electronic thermometer, (2) a substantial number of customers have accepted

the TSP tie in, and (3) IVAC possesses a dominant market position (up to 80 percent) in the field of electronic thermometers and disposable probe covers.

In United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1921), this Court held that a seller occupying a "dominant position" in the shoe machinery industry, without more, violated Section 3 of the Clayton Act by imposing contracts tying the lease of its machines to the purchase of other types of machinery and incidental supplies. Potential lessening of competition was automatically inferred from the seller's "dominating position". Id. 258 U.S. at pp. 457-458.

The specific market that has been foreclosed by appellee's "TSP" marketing plan comprises the manufacture and distribution of disposable probe covers which are

compatible with appellee's patented electronic thermometer units. The fact that appellee possesses a monopoly over the tying product (IVAC's electronic thermometers) pursuant to several U.S. Letter Patent, clearly evidences appellee's dominant market position. Appellee's economic power as derived from its dominant market position may thus automatically be inferred.

This Court went several steps further in inferring a defendant's economic power in a case involving copyrighted tying items. The Court, in United States v. Loew's, Inc., 371 U.S. 38 (1962), held that even absent a showing of market dominance, economic power could be inferred from "the tying product's desirability to consumers or from uniqueness of its attributes." 371 U.S. at 45. The requisite "uniqueness" will be presumed "when the

tying product is patented or copyrighted", citing International Salt Co. v. United States, 332 U.S. 392 (1947). In the Lowe's case, supra, this Court reasoned that:

> "Since one of the objectives of the patent law is to reward uniqueness, the principle of these cases [i.e., Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 37 S.Ct. 61 L. Ed 871] was carried over into antitrust law on the theory that the existence of a valid patent on the tying product, without more, establishes a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anti-competitive consequences." U.S. v. Loew's, Inc., supra, 371 U.S. at 46.

IVAC's practice of conditioning the use of its unique electronic thermometer upon the consumer's agreement to purchase a minimum of 15,000 disposable probe covers per unit not only results in a restraint upon

competition in the tied product market (disposable probe covers), but also tends to unlawfully extend its monopoly power in the patented product to a completely distinct product market.

Focusing now upon the requirement that a "not insubstantial" amount of commerce be affected in the market for the tied item, this Court has developed and applied a "quantitative substantiality" test. United States v. Loew's Inc. supra, 27 U. S. 38; International Salt Co. v. United States, 332 U.S. 393 (1947). Under the foregoing test, a Section 3 Clayton Act and Section 1 Sherman Act tie-in violation will be found if the dollar volume of commerce affected in the market for the tied product is not insubstantial. Thus, without any reference to the total volume of commerce in the market for the tied product, the Supreme Court held $500,000 to

be a "not insubstantial" amount of commerce.

In Advance Business Systems & Supply Co. v. SCM Corp., supra, 415 F. 2d 55, the defendant (SCM) contended that the plaintiff had not shown that a substantial amount of commerce in the tied product (paper supplies for copying machines) had been restrained. The plaintiff had shown that in selling its supplies in the Baltimore area, it discovered SCM copying machines in eight locations. SCM contended that the existence of eight lease arrangements in the relevant market was too insubstantial to support a finding of a Section 3 or a Section 1 violation.

The court of appeals, affirming the district court's decision, rejected SCM;s contention, reasoning:

> "SCM misconstrues the District Court's finding which is not limited to foreclosure of that portion of the market in which

the plaintiff and defendant are actual competitors. As the Supreme Court recently said in Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502 (April 7, 1969):

> "'Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition. [Citation omitted] For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, the relevant figure is the total volume of sales tied by the sale policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit. (Original) In the present case, the District Court found that in 1966 SCM sold approximately 200 million sheets of paper to be used with Model 55's under copy service. At a copy service

> this source was $7,000,000. Clearly this represents a substantial volume of commerce. See Forner Enterprises, Inc. v. United States Steel Corp., supra, (almost $200,000 not insubstantial); International Salt Co. v. United States, 332 U.S. 392 (1947) ($400,000).'" (Footnote omitted) 415 F.2d at 63-63.

The relevant figure in the present case is the "total volume of sales tied" by IVAC's TSP marketing plan. In four years the total volume of disposable probe cover sales tied to the TSP plan amounts to over $30,000,000. This sum clearly represents a substantial volume of commerce affected in the tied product market (disposable probe covers).

From the above, is apparent that the tying arrangements instituted pursuant to the TSP market plan fit squarely within the per se proscriptions of both Section 3 of the Clayton Act and Section 1 of the Sherman

Act. The decision below, consequently, is directly contrary to the authority in other circuits and in the Ninth Circuit itself holding that such arrangements are illegal. The opinion below is all the more out of line with these authorities for approving summary disposition by the district court of Petitioners' action, despite the evidence adverted to above supporting their claim of an illegal tie-in.

It is well to note again that the issue raised herein concerns standards to be applied by a district court in passing on a motion for summary judgment in a civil antitrust suit. Summary judgment in antitrust cases is disfavored, with the consequence that WAYS & MEANS' claims of IVAC's appreciable economic power and not insubstantial amount of commerce affected in the market for the tied item, should be read in the light most favorable to Petitioners. Fortner Enterprises v. U. S. Steel Corp..

394 U.S. 495, 505 (1965), on remand, 452 F. 2d 1095 (6th Cir. 1971), cert. denied, 406 U. S. 919 (1972), 523 F. 2d 691 (1971), rev'd, 429 U.S. 610 (1977). Under these circumstances, the tying arrangements pursuant to the TSP sales program cannot be summarily found to be beyond the scope of Section 3 of the Clayton Act and Section 1 of the Sherman Act.

## CONCLUSION

For reasons advanced herein, the Court should grant a writ of certiorari to the court of appeals.

Respectfully submitted,

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WAYS & MEANS, INC., a corporation, and Labcon, Inc., a corporation,

Plaintiffs-Appellants,

v.

IVAC CORPORATION, a corporation,

Defendant-Appellee

No. 79-4095

UNITED STATES COURT OF APPEAL
NINTH CIRCUIT

Argued and Submitted Dec. 9, 1980

Decided Feb. 2, 1981

Appeal from the United States District Court for the Northern District of California, William H. Orrick, Judge

Before DUNIWAY and FERGUSON, Circuit Judges, and GRANT, * District Judge.

PER CURIAM:

We are in accord with the opinion of the district court. 1979-2 Trade

* Honorable Robert A. Grant, Senior United States District Judge, Northern District of Indiana, sitting by designation.

APPENDIX "A"

Cases ¶ 61,734, ___F.Supp. ___(N.D. Cal. 1981). Ways and Means claims that the district court drew the erroneous conclusion that the cost of the plaintiff's thermometer covers and IVAC's thermometer was lower than that of the allegedly illegal tie. However, the precision of this conclusion is not determinative of our judgment, and Ways & Means has failed to demonstrate that the figures used by the district court below are incorrect. Moreover, the district court's discussion of the absence of any illegal tying arrangement equally demonstrates that IVAC's behaviour was neither an unreasonable restraint of trade nor predatory. See California Computer Products v. International Business Machines, 613 F.2d 727, 735-37 (9th Cir. (1979). We express no opinion on the second portion of the district court's opinion concerning Ways

& Means' showing on damages.

AFFIRMED.

WAYS & MEANS, INC., a corporation,
and Labcon, Inc., a corporation,

Plaintiffs,

v.

IVAC CORPORATION, a corporation,

Defendant.

No. C-76-2017 WHO

UNITED STATES DISTRICT COURT
N.D. CALIFORNIA

June 18, 1979

Plaintiffs brought suit alleging that defendant's marketing program constituted tying arrangements in violation of Sherman and Clayton Acts. On cross motions for summary judgment, the District Court, Orrick, J., held that: (1) manufacturer's plan whereby it rented entire temperature-taking covers, other accessories, in-service training for hospital personnel, and maintenance, and whereby users agreed to purchase 15,000 probe covers for each

APPENDIX "B"

thermometer provided did not constitute illegal tying arrangement' (2) "damage study" prepared for plaintiffs purporting to show future potential earnings by plaintiffs in absence of defendant's marketing program lacked sufficient foundation; and (3) plaintiffs' showing of injury and damages arising from alleged tying arrangement with respect to probe covers was insufficient.

Defendant's motion granted.

Affirmed, 9 Cir., 638 F.2d 143.

OPINION

ORRICK, District Judge.

This case tests the propriety of certain marketing devices employed in a relatively new area of the health care industry by defendant, IVAC Corporation ("IVAC"), a Delaware corporation based in San Diego, California, which manufactures and sells electronic thermometers. These instruments, described in more detail

below, record human temperatures through use of a temperature-sensitive probe sheathed in a disposable plastic probe cover. Since 1971, IVAC has marketed its thermometer through a program by which hospitals essentially lease, for a monthly fee, a complete temperature-taking system, including thermometers, probe covers, and all other necessary accessories. Throughout the period from 1971 to the present, defendant's thermometers have also been available for purchase or lease outside the program.

Plaintiff Ways & Means, Inc. ("Ways and Means"), a California corporation, manufactures probe covers compatible with IVAC's thermometers, and competes with IVAC in the sale thereof. These products are marketed through plaintiff Labcon, Inc. ("Labcon"), a wholly-owned subsidiary of Ways & Means. In this action, plaintiffs contend that IVAC's marketing pro-

gram constitutes an unlawful tying arrangement in violation of the Clayton Act, 15 U.S.C. § 14,[1] and that through its use, IVAC has restrained trade and attempted to monopolize the market for probe covers, all in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[2] The matter is presently before the Court on cross-motions for summary judgment. For the

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1. Section 3 of the Clayton Act provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substan-

tially lessen competition or tend to create a monopoly, in any line of commerce." 15 U.S.C. § 14.

2. Sections 1 and 2 of the Sherman Act provide:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments in the discretion of the court." 15 U.S.C. § 1.

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment, not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 2

reasons hereinafter set forth, the Court, finding there to exist no genuine issue as to any fact material to the disposition of this case, enters judgment for the defendant.

I

IVAC first developed its electronic thermometer in 1969. This product is a small portable unit which utilizes battery-powered subminiature electonic components to provide a digital temperature display. The thermometer is attached by a flexible cord to a temperature-sensitive probe which is enclosed in a pastic probe cover. The disposable plastic probe cover eliminates the need for sterilization between uses, since a separate probe cover is used for each temperature taken. IVAC has obtained a variety of patents on these products.

IVAC began to sell its product in

1970. Initially, a traditional marketing approach was utilized: thermometers were sold outright to hospitals, which paid one price for each thermometer, and separate prices for probe covers and other accessories necessary to operate the system.[3] According to IVAC, this approach met with several objections from hospital administrators, who feared that the units would rapidly become obsolete through new development, who voiced concerns over the ability of nurses to operate the thermometers, and whose capital budgets could not easily accomodate the purchase of such expensive equipment.

In response to these problems, IVAC introduced, in 1971, a new marketing approach called the "Temperature System

3. Although the cost of thermometers has varied, each unit sells for several hundred dollars. Probe covers, by contrast, market for between $20 and $50 per 1,000 units.

Program," or "TSP." Under TSP, IVAC provided hospitals with an entire temperature-taking system, including thermometers, probe covers, other accessories, in-service training for hospital personnel, and maintenance. Users agreed to purchase 15,000 probe covers for each thermometer provided, and were billed on a monthly basis. The system was available for one or two-year periods and, for a premium rate, a thirty-day cancellation option was included. Such a program eased the fears of obsolecense, facilitated the introduction of the devices into hospital routine, and, because probe covers were purchased with operating funds, avoided the need for capital outlays in the acquisition of the thermometers.

The TSP program was apparently successful, and has remained in use since its

introduction. But although the TSP has been the principal vehicle through which IVAC has marketed electronic thermometers and probe covers, it has never been the exclusive means of acquiring either product. Electronic thermometers have also been available for purchase or lease throughout the period in question. Indeed, plaintiffs conceded that defendant has never refused to sell thermometers outside the TSP program.[4] And it is clear that

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4. One of the few undisputed facts set forth in the parties' Joint Pretrial Statement reads as follows:

> "Defendant IVAC has always been willing to sell electronic thermometers to customers whether or not these customers also bought or used IVAC's disposable probe covers."

Moreover, the following response was given by plaintiffs in answering to one of defendant's interrogatories:

> INT: "Do plaintiffs contend that defendant has ever refused to sell its electronic thermometers unless the purchaser also agrees to purchase from defendant***IVAC's disposable probe covers?
>
> ANS: No."

since 1971, a substantial percentage - perhaps 25% - of defendant's sales of thermometers have been through the direct sale of units to hospitals, outside the TSP program.[5] Moreover, a small but not insignificant number of units have been leased during the period, apart from TSP.[6]

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5. Although the precise number of thermometer sales made outside the TSP program may be in dispute, the differences between the parties' positions are immaterial. Plaintiffs calculate through use of defendant's financial statements that during the period from 1974 to 1977, 13,842 thermometers (75%) were marketed under TSP, while 4,798 (25%) were sold outright. Russ Affidavit, Exhibit A. Defendant estimates, through less carefully documented means, that over 8,000 thermometers had been sold outright by 1976. Meyer Affidavit. Based upon all the material submitted, the Court finds beyond dispute that the percentage of outright sales is approximately 25% of the total. Moreoever, counsel for the plaintiffs stipulated to this figure during oral argument.

6. Documentary evidence submitted by the plaintiffs indicates that during the period from 1974 to 1976, approximately 100 thermometers were leased outside the TSP program. Offstein Affidavit, Exhibit 13.

The complaint was filed on September 20, 1976, alleging in essence that defendant's TSP program constituted a tying arrangement in violation of the Sherman and Clayton Acts, and that defendant had sought to monopolize the probe cover market through utilization of this arrangement. 15 U.S.C. §§ 1, 2, 14. In March, 1978, cross-motions for summary judgment were made. Plaintiffs asserted that, as a matter of law, the undisputed facts disclosed the existence of an unlawful tying arrangement. Defendant urged three grounds for its motion: (1) that because the thermometers and probe covers are separately available to customers, the TSP program cannot be held to be a tying arrangement, Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); (2) that there exists a "crucial relationship" between the thermometers and the probe

covers which justifies their sale as a package. United States v. Jerrold Electronics Corp. 187 F.Supp. 545 (E.D.Pa 1960); and (3) that plaintiffs failed to produce any evidence from which to infer that they had been injured by the TSP program. These motions were denied on April 21, 1978.

In November, 1978, immediately prior to trial, plaintiffs moved for a ruling on the admissibility of a "damage study" which purported to document the damages they had suffered. At that time, the cross-motions for summary judgment were renewed and oral argument was heard. The Court found the damage study to be inadmissible for the reasons stated below. Further, having reconsidered its earlier rulings on the cross-motions for summary judgment, the Court now finds summary judgment appropriate based upon the first

and third grounds asserted by the defendant, which are discussed seriatim.[7]

II

A.

[1] The Supreme Court has condemned illegal tying arrangements as per se violations of the antitrust laws. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 89 S.Ct. 1252, 22 L.ED.2d 495 (1969) (hereinafter cited as Forner I); Northern Pacific Ry. Co. v. United States, supra. In Northern Pacific and subsequent cases, three elements necessary to constitute an unlawful tie-in have been articulated. First, there must in fact exist a tying scheme by which purchasers are required to

7. Because the Court finds there to exist genuine issues of fact concerning defendant's allegations with respect to its Jerrold Electronics defense, this Opinion shall not concern itself with that ground.

buy one commodity or service in order to obtain a second, distinct commodity or service. Second, the seller must possess sufficient economic power in the tying product to enable him to impose significant restrictions in the market for the tied product. Third, a not insubstantial amount of interstate commerce in the tied product must be affected. Northern Pacific Ry. Co. v. United States, supra, 356 U.S. at 5-7, 78 S.Ct. at 518-519. Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1212 (9th Cir. 1977). The law views such arrangements harshly, for their operation may force buyers to forego more desirable alternatives in the tied product, thus foreclosing significant portions of the market in the tied product from competing suppliers. Forner I, supra, 394 U.S. U.S. at 498-99, 89 S.Ct. at 1256-1257;

United States v. Loew's Inc., 371 U.S. 38, 45, 83 S.Ct. 97, 102, 9 L.Ed.2d 11 (1962).

Plaintiff's reliance upon the defendant's TSP program as an express, contractual tying arrangement cannot succeed, for defendant's overall marketing program does not possess the first element outlined above. In Northern Pacific, the Court noted:

> "Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." Id. 356 U.S. at 6, n.4, 78 S.Ct. at 518, n.4."

This proviso merely restates the obvious: if the desireable, tying product is truly available without the condition that other products be purchased with it, its alternative sale as part of a package cannot logically be a device to force the purchase of

the "tied" products. Recognizing this, courts continue to require that, in order to succeed upon such a claim, a plaintiff must first demonstrate the actual existence of a tying arrangement. Moore v. Jas. H. Matthews & Co., supra, 550 F.2d at 1216; Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 708 (7th Cir. 1978), cert denied, 439 U.S. 822, 99 S.Ct. 87, 58 L.Ed.2d 113 (1978); Heatransfer Corp. v. Volkswagenwerk A.G., 553 F.2d 964 (5th Cir. (1977), cert denied, rer U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978).

[2] In the instant case, it is clear that defendant offered its electronic thermometers for sale or lease outside the TSP program. By undisputed facts set forth in the parties' Joint Pretrial Statement, plaintiffs have conceded that IVAC has always been willing to sell its thermometers whether or not

the customer also purchased probe covers. See n.4, supra. The same admission was made in answers to defendant's interrogatories. In addition, plaintiffs' pleadings and affidavits themselves document the instances in which outright sales and leases of thermometers have taken place. See Russ affidavit, Exhibit A; Plaintiffs' Memorandum in Support of Motion for Summary Judgment, at 14. Based upon these established facts, plaintiffs' claim that the TSP program constitutes an explicit tie-in is insufficient as a matter of law.

This does not end the analysis, however, for plaintiffs are correct in their assertion that separate availability will not preclude antitrust liability where a defendant has established its pricing policy in such a way

that the only viable economic option is to purchase the tying and tied products in a single package. The Supreme Court recognized the dangers of price tie-ins in United States v. Loew's, Inc., supra, in which the district court had found movie distributors guilty of conditioning licenses for popular films upon acceptance of a package containing inferior releases. The judgment enjoined the defendants from:

> "Entering into any agreement to sell or license the right to exhibit any feature film over any television station in which differential between the price or fee for such feature film when sold or licensed alone and the price or fee for the same film when sold or licensed with one or more other film [sic] has the effect of conditioning the sale or license of such film upon the sale or license of one or more other films." Id. 371 U.S. at 43, 83 S.Ct. at 101

The Supreme Court affirmed the inclusion of such language in the final relief. Id. at 54-55, 83 S.Ct. at 106-107.

Subsequent decisions have acknowledged the importance of policing differential price structures. American Manufacturers Mutual Insurance Co. v. American Broadcasting-Paramount Theatres, Inc., 388 F.2d 272 (2d Cir. 1967); Advance Business Systems & Supply Co. v. SCM Corp., 287 F.Supp 143 (D.Md. (1968), aff'd, 415 F.2d 55 (4th Cir. 1969), cert. denied, 397 U.S. 920, 90 S.Ct. 928, 25 L.Ed.2d 101 (1970). In American Manufacturers, plaintiff insurance companies complained that the American Broadcasting Company had refused to sell sponsorship rights in its evening news program unless purchasers paid for broadcast on the entire network,

thus tying sponsorship of less popular local stations to sponsorship of highly desirable stations. In considering the merits of plaintiffs' claim, the court stated the rule as follows:

> "As we view the law, where there is no quality or distinguishing desideratum between a product offered singly or in a package, the seller cannot charge substantially higher for the individual product if the price differential has the effect of conditioning the sale of the entire package and if the difference in price cannot be legitimately justified by cost considerations." Id. at 283.

In SCM, the Fourth Circuit reached the same conclusion. There, defendant, in order to tie up sales of its copy paper, offered copying machines on a "copy service" basis, whereby consumers paid a flat fee per copy, and were provided with an entire duplicating system, including paper, toner,

ect. Its highly desirable machines were also available for sale, but at a price far in excess of the cost of the "copy service" plan. The court denounced the arrangement, holding that

> "[tie-ins] are non-coercive, and therefore legal, only if the components are separately available to the customer on a basis as favorable to the tie-in arrangement." Advance Business Systems & Supply Co. v. SCM Corp., supra, 415 F.2d at 62.

Cognizant of these principles, the Court nevertheless concludes that plaintiffs have failed to produce sufficient evidence from which any inference of unfairness can be drawn with respect to defendant's pricing policy. Most glaring is the undisputed fact that approximately 25% of all purchases of electronic thermometers were made outside the TSP

program.[8] This fact suggests that, a fortiori, separate purchase of thermometers and probe covers was a reasonable alternative. Moreover, as set forth in greater detail in the margin,[9] under no view of the facts can it be said that defendant's price facts can it be said that defendant's price differentials render the TSP program the sole viable option for purchasers. Hospitals wishing to purchase defendant's thermometers outside the TSP program could not only do so, but could accomplish such a result at a lower price

8. During oral argument on December 27, 1978, plaintiffs suggested, for the first time during the litigation, that the 25% non-TSP purchasers might represent a special class of high-volume users (i.e., hospitals with exceptional temperature-taking needs), differentiable from other customers. This kind of eleventh-hour assertion, unsupported by any facts in the record, is hardly sufficient to demonstrate the existence of a genuine issue of material fact.

9. The parties have each attempted to set forth figures comparing the costs of procuring temperature-taking systems under various alternatives. See Plaintiffs' Memorandum in Support of Motion for Summary Judgment at 6-9. First Affidavit of Weill, at 2-3. These attempts disclose that the basic prices for various components of the system are undisputed, and can be gleaned from price lists submitted as exhibits. Offstein Affidavit, Exhibit 9; Defendant's Exhibit 1066A. Using prices in effect during 1974, the following simple data can be generated:

ANNUAL COST OF SINGLE THERMOMETER WITH 15,000 PROBE COVERS

| TSP | Purchase of Thermometer and Probe Covers from Dft. | Purchase of Thermometer From Def, Probe Covers From Pltfs. |
|---|---|---|
| 1 Yr.$670 | 786* | 561* |

/ / /

/ / /

/ / /

/ / /

9. (Cont'd)

| | TSP | Purchase of Thermometer and Probe Covers From Dft. | Purchase of Thermometer From Dft. Probe Covers From Pltfs. |
|---|---|---|---|
| One Year (w/30-day canc.) clause.) | 720 | | |
| Two yrs. | 630 | 786 | 561 |
| Three yrs. | 590 | 786 | 561 |

*(The purchase figure for one electronic thermometer is determined by depreciating the total cost of $555 over a five-year period, a conservative estimate of the instrument's useful life. The price of IVAC probe covers is computed at $45 per 1,000 units. The price of plaintiffs' probe covers is computed at $30 per 1,000 units.)

As the table graphically illustrates, a customer wishing to economize would purchase a thermometer from defendant and probe covers from plaintiffs - this is the least expensive arrangement. Were defendant attempting to create a tying situation through pricing policy, the purchase price of the tying product - electronic thermometers - would be established at a figure so high that cost savings via separate purchases would not be possible.

than possible through the TSP program. A defendant engaged in establishing a tying arrangement could not permit this to occur. Under this set if circumstances, no trier of fact could correctly conclude that an implicit tying arrangement existed by virtue of price manipulation.

Plaintiffs' reliance upon SCM does not alter the result here. In that case, the outlines of which are set forth above, the court merely refused to accept separate availability as a complete defense to allegations of tying. Examining the particulars of defendant's pricing policy, the court found that "[purchase] of a copying machine for $4250*** is clearly not the economic equivalent of a rental at a charge of approximately $.035 per copy." Advance Business System

& Supply Co. v. SCM Corp., supra, 415 F.2d at 62. In addition, extremely few sales of the copiers had actually been made - none within the relevant geographical market - and the machines were not available on a lease basis outside the tying arrangement. Id. 287 F.Supp. at 152, 156. Finally, such economic coercion was accompanies by less subtle means of persuasion, including misrepresentations as to competing products, industrial sabotage, and refusals to deal. No such allegations have been made in the instant case.

The Court thus finds that, as a matter of law, defendant's TSP program does not constitute an illegal tying arrangement in violation of the Clayton or Sherman Acts, 15 U.S.C. §§ 1, 2, 14. The undisputed facts demonstrate that there

does not exist a tie-in of two products by which the sale of one is conditioned upon acceptance of the other.

B.

[3] It is well-established in this circuit, as elsewhere, that Sherman and Clayton Act recovery is only available "where actual injury as been suffered." Gray v. Shell Oil Co. 469 F.2d 742, (9th Cir. 1972); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971). Plaintiffs rest their claim of actual injury on two proffered items of evidence: (1) a "damage study" prepared specifically for use at trial; and (2) the testimony of Thomas W. Van Ryne, III, a marketing officer for plaintiff Labcon, to the effect that plaintiffs' failure to sell probe covers in greater quantities was the result of defendant's marketing

techniques. Having thoroughly examined the damage study and the supporting affidavits and exhibits, the Court now denies plaintiffs' motion for a pretrial ruling of admissibility, and finds the study inadmissible as evidence pursuant to Rule 703 of the Federal Rules of Evidence. This leaves only the testimony of Van Ryne, which is clearly insufficient to establish the existence of a genuine issue of material fact as to damages.

[4] The damage study was prepared for plaintiffs by C. Michael Davie, a medical research economist at SRI International in Menlo Park, California. At the time he conducted the study, Davie had served in that position for slightly less than a year, having had previous experience in the areas of sales, market research, product evaluation and planning

in the medical products field. Davie has degrees in psychology, biology, and business administration.

The study itself is composed of two elements. The first is a "Summary of Responses" to a telephone survey conducted by Davie amont 25 of defendant's 1,750 TSP customers. Davie Affidavit, Exhibit B. This survey, which was performed by propounding the questions set forth in Exhibit A to the Davie Affidavit, explores the openness of IVAC's TSP customers to alternative manufacturers of probe covers, as well as the effect of defendant's TSP program on the probe cover market generally. The second element of the study attempts to calculate defendant's market shares in the thermometer and probe cover markets, projected sales growth for IVAC through 1985, and hypothetical market shares for plaintiffs under varying assumptions. Davie Affi-

davit, Exhibits C-G. This portion of the study was prepared with information obtained from defendant's price lists and market reports, similar information prepared by competitors, and general health industry data.

Rule 703 of the Federal Rules of Evidence provides:

> "The facts or data in the particular case upon which an expert bases an opinion or inference may be those preceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts need not be admissible in evidence."

The Advisory Committee Notes, 51 F.R.D. 404 (1971) make clear that one purpose of the rule was to facilitate the use at trial of polls and surveys.

> "The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved."

The modern trend appears to be to examine the admissibility of survey evidence without regard to traditional hearsay analysis relying instead upon the two principal factors suggested by Rule 703: (1) whether or not there is some necessity that makes the survey desirable; and (2) whether or not the survey itself is trustworthy. 1 J. Moore, Federal Practice ¶ 2.71 (2d ed. 1974); Zippo Manufacturing Co. v. Rodgers Imports, Inc., 216 F.Supp 670 (S.D.N.Y. 1963).

It appears that plaintiffs could easily meet the necessity requirements, for assuming that the amenability of IVAC's TSP customers to plaintiffs' products is relevant to damages, plaintiffs can scarcely be expected to canvass all 1,750 TSP customers; accordingly, some survey sampling is certainly in order. However, as to the trustworthiness of the study, plaintiffs encounter more

difficulty. On this issue, Professor Moore has provided a helpful standard:

> "The offeror has the burden of establishing that a proffered poll was conducted in accordance with accepted principles of survey research, i.e., that the proper universe was examined, that a representative sample was drawn from that universe, and that the mode of questioning the interviewees was correct. He should be required to show that: the persons conducting the survey were recognized experts; the data gathered was accurately reported; and the sample design, the questionnaire and the interviewing were in accordance with generally accepted standards of objective procedure and statistics in the field of such surveys. Normally this showing will be made through the testimony of the persons responsible for the various parts of the survey." 1 L. Moore, Federal Practice ¶ 2.71 (footnote omitted).

The leading case of Zippo Manufacturing Co. v. Rogers Imports, Inc., supra, is illustrative. There, plaintiff in a trademark infringement case attempted to demonstrate consumer confusion through use of a survey. The expert

conduction the survey testified extensively as to "the principles and procedures by which surveys were conceived and conducted," including: (1) the various drafts through which survey questions were perfected, (2) the detailed manner in which the sample survey was arrived at, and (3) the actual conduct of the survey itself. The original responses to the questions were made available to the defendant. In addition, plaintiff produced a second witness, expert in the field of "survey research," who testified that "the project was conducted objectively and scientifically." With this as foundation, Judge Feinberg admitted the survey into evidence.

Plaintiffs' damage study does not measure up to these standards, for a variety

of reasons.[10] As a preliminary matter, the relevance of the study is questionable. The entire thrust is directed to showing future potential earnings by plaintiffs in the absence of a TSP program. It is extremely unclear what bearing such projections have on the issue of actual losses sustained during the period in which IVAC was imposing the alleged tying arrangement.

In addition, no testimony has been proffered which bears on the critical standard of Rule 703: whether or not such a survey is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." In Zippo, this was

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10. Several, though not all, of the objections which follow in the text might have been cured by the Supplemental Affidavit of C. Michael Davie. However, that document was filed on December 27, 1978, the very day set for oral argument, and hence did not enter into the Court's consideration of this case.

done through testimony of an independent expert who did not participate in the survey itself. There is little to suggest that Mr. Davie, though a "medical research economist," has sufficient expertise in the preparation and administration of surveys. His qualifications include "surveys and evaluations of new and existing medical products and inventions" - but this does not suggest any degree of sophistication in opinion polling of the kind utilized here. Furthermore, although Mr. Davie indicates that the Questionnaire was prepared "in consultation with other members of the staff at SRI International," no further identification or qualifications are given.

Moreoever, very little has been profered in terms of the specific procedures utilized in conducting the survey. The Court is informed only that the hospitals

contacted were selected using "a standard table of random numbers." Nothing is said about the sufficiency of the size of the sample (25 customers out of 1,750), the manner in which the questionnaire was developed, or the mode of questioning (for example, certain of the questions propounded in the questionnaire appear to be extremely suggestive). Nor is the significance of the 20% sampling error discussed. As well, the survey results appear to contain internal inconsistencies which render them confusing. For example, Exhibit B indicates that while only 14 of 22 IVAC customers surveyed said they would be willing to evaluate less expensive probe covers, the breakdown of responses by price level category suggests that all 22 responded in the affirmative.

Finally, there appear to be several problems with the market share data con-

tained in Exhibits C-G. Source material is unclear for many of the exhibits (for example, Davie refers to "various literature sources, including medical and surgical books"), development of IVAC market share figures is not clear, it is not specified whether or not IVAC future sales projections were tested against historical sales data, and no historical periods are provided by which to date most of the exhibits.

For all of the above reasons, the Court finds insufficient foundation upon which to admit the study and, accordingly, it is excluded.

[5] The Court now turns to the question of whether or not in the absence of plaintiffs' "damage study," there is any evidence whatsoever by which plaintiffs can demonstrate injury and damages. The Ninth Circuit has prescribed the following formula for making such a determination:

> "We take it that the controlling rule today in seeking damages for loss of profits in antitrust cases is that the plaintiff is required to establish with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue. Once that has been accomplished, the jury will be permitted to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' Bigelow v. RKO Radio Pictures, Inc., supra, 327 U.S. [251] at page 264, 66 S.Ct. [574] at page 580 [90 L.Ed. 652]. The cases have drawn a distinction between the quantum of proof necessary to show the fact as distinguished from the amount of damage; the burden as to the former is the more stringent one. In other words, the fact of injury must first be shown before the jury is allowed to estimate the amount of damage." Flintkote Co. v. Lysfjord, 246 F.2d 368, 392 (9th Cir. 1957), cert. denied, 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed. 2d 46 (1957).

Accord, Knutson v. Daily Review, Inc. 548 F.2d 795 (9th Cir. 1976). Hence, there appear to be two requisites to a successful showing by plaintiffs: (1) a showing of actual injury resulting from the unlaw-

ful actions of the defendant; and (2) production of "relevant data' from which a jury can make a "just and reasonable estimate of the damages." Based upon all the evidence proffered to date, plaintiffs have failed to establish the existence of genuine issues of fact bearing upon these standards.

[6] With respect to the requisite showing of the fact of injury, the cases are uniform in requiring that some actual injury be shown. Id. at 811; Gray v. Shell Oil Co., supra; Wolfe v. National Lead Co., 225 F.2d 427 (9th Cir. 1955). Typically, this requires some demonstration of lost revenues or profits, Mt. Hood States, Inc. v. Greyhound Corp., 55 F.2d 687 (9th Cir. 1977); Greyhound Computer Corp. v. IBM Corp., 559 F.2d 488 (9th Cir. 1977), or a showing of an increase in prices paid for goods purchased. Gray v. Shell Oil Co., supra; Lessig v. Tidewater Oil Co.

327 F.2d 459 (9th Cir. 1964). Here, even were plaintiffs to establish the existence of a tie-in, there is no competent evidence whatsoever from which actual injury could be found. Nothing has been presented to demonstrate shrinking revenues or profits, nor have plaintiffs proffered any facts from which it could be inferred that, absent TSP, Labcon probe covers would have captured a greater share of the market. In this regard, the testimony of Van Ryne, standing alone, is far too slender a reed upon which to base genuine issues of material fact.

Plaintiffs vigorously contend, relying upon Richfield, Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), that once defendant has been found guilty of unlawful conduct, the fact of injury must be inferred as a matter of law. The Court does not read Karseal so generously. There,

plaintiff alleges that defendant oil company, in its relationship with its dealers, had tied the sale of automotive accessories to the sale of gasoline. There was evidence that defendant's sales representatives had told dealers not to trade in plaintiff's products, to remove inventory from shelves, and had made other threats. Without much elaboration, the court concluded that "it seems patent that the restraint applied would result in some loss of business." Id. at 713. However, the issue in Karseal was apparently not whether injury had been demonstrated, but whether the proven injury had been causally linked to defendant's misconduct. Indeed, the court assumed that injury had in fact been proven:

> "Richfield concedes that once Karseal had shown that the defendant had violated the antitrust laws, and the further fact that Karseal actually suffered damage to its business or property,

> the jury was permitted to make a just and reasonable estimate of plaintiff's damages." Id. at 713

Moreover, the proven misconduct in Karseal far exceeds anything alleged to have occurred in the instant case.

Plaintiff's fall even farther short in their attempt to muster "relevant data" from which a "just and reasonable estimate" can be made. Recognizing the traditional liberality in this area,[11] the Court nevertheless concludes that, in the absence of their "damage study," plaintiffs have made no showing which can survive summary disposition. The Ninth Circuit has identified several routes by which plaintiffs' burden may be met:

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11. Characteristic of judicial attitudes is the following statement in Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265-66 S.Ct. 574, 580-581, 90 L.Ed 652 (1946):

> "'The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's rights."

> "There are three chief types if evidence which the decisions have approved as the basis for the award of damages. (1) Business records for plaintiff or his predecessor before the conspiracy arose. (2) Business records of comparative but unrestrained enterprises during the particular period in question. (3) Expert opinion based on items (1) or (2)." Flintkote Co. v. Lysfjord, supra, 246 F.2d at 392 (footnotes omitted).

For example, in Karseal, plaintiff prevailed by showing that, on the open market, his product outsold defendant's by a 3 to 1 margin. By demonstrating the quantity of defendant's product sold by gas dealers who had been foreclosed from selling plaintiff's, plaintiff was held to have provided the jury with the requisite factual basis. Richfield Oil Corp. v. Karseal Corp, supra, 271 F.2d at 714. Similar showings have carried the day in other cases. See Mt. Hood Stages, Inc. v. Greyhound, supra (plaintiff presented evidence of profits prior to defendant's antitrust violation, as well as data concerning historical passenger patterns); Lessig v. Tidewater Oil

Co., supra, (in action by dealer against oil company which had allegedly tied expensive accessories to gas purchases, plaintiff showed difference in price paid under tying arrangement and market price); Greyhound Computer Corp. v. IBM Corp., supra, (plaintiff used prior history to estimate profits lost when defendant terminated sales of computers to plaintiff).

In contrast, the Ninth Circuit has denied recovery when the factual basis from which they claimed resulted from defendant's refusal to sell them building materials necessary to their business. The sole evidence of injury was plaintiffs' testimony as to their own expectations of profits, based upon prior endeavors in other businesses. They admitted to having little managerial experience or knowledge about the business in which they sought to enter. Noting the absence of any evidence concerning comparable businesses, or earlier profits of this business, the court found such

evidence insufficient to support a jury verdict. Flintkote v. Lysfjord, supra, 246 F.2d at 398-94. See Gray v. Shell Oil Co., supra.

The Court finds plaintiffs' showing similarly deficient. Despite a two-year period in which to garner the facts, plaintiffs propose to offer no evidence of sales data from the period prior to the introduction of TSP, no evidence of sales data from comparable markets in other products, and no information concerning competition in the sale of probe covers to the federal government (an area in which the parties apparently compete). In the absence of any basis for making a reasonable estimate, the Court must render summary judgment for defendant and against plaintiffs.

Accordingly, defendant's motion for summary judgment is GRANTED, and plaintiffs' motion for summary judgment is

DENIED. Defendant will lodge with the Court a form of judgment on or before June 29, 1979.

IN THE UNITED STATES SUPREME COURT

October Term, 1981

WAYS & MEANS, INC., a corporation and LABCON, INC., a corporation,

Plaintiffs-Appellants,

vs.

IVAN CORPORATION, a corporation,

Defendant-Appellee

---

AFFIDAVIT IN COMPLIANCE WITH Rule 28.2

---

STATE OF CALIFORNIA )
) ss
CITY AND COUNTY OF SAN FRANCISCO )

JERROLD N. OFFSTEIN, declares:

1. He is a member in good standing of the bar of this court; he is counsel of record for Petitioner, and that he makes this affidavit in compliance with Rule 28.2.

2. On July 1, 1981 he deposited the below-identified copies of the Petition for a Writ of Centiorari to the Ninth Circuit Court of Appeals in the United States mails, first-class postage prepaid, at San Francisco, California.

3. This service is within the timely service requirements.

4. The following addresses were mailed the parenthetically indicated number of copies, as foresaid:

(a) RICHARD J. ARCHER, Esq.
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(b) Clerk, United States
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JERROLD N. OFFSTEIN
Attorney for Petitioner

Subscribed and sworn to
before me this 1st day
of July, 1981

Mildred J. Grothman

OFFICIAL SEAL
MILDRED J. GROTHMAN
NOTARY PUBLIC - CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO
My Commission Expires August 11, 1983

# Opposition

Office-Supreme Court, U.S.
FILED
SEP 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-248

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1981

WAYS & MEANS, INC., a corporation
and LABCON, INC., a corporation,
*Petitioners,*

vs.

IVAC CORPORATION, a corporation,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

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## RESTATEMENT OF QUESTION PRESENTED

Can there be an illegal tie under the following conditions:

1. Where admittedly the alleged tying and tied products are separately available to customers;

2. Where admittedly the alleged tying product is in fact acquired separately by customers in 25% of all cases;

3. Where the price of the alleged tying product together with the price of petitioners' substitute for the tied product is lower than respondent's combination price;

4. Where price is not the reason for the customer's choice to acquire the combination;

5. Where the alleged tying did not in fact foreclose any sale of petitioners' substitute for the alleged tied product?

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No. 81-248

# In the Supreme Court

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# United States

OCTOBER TERM, 1981

WAYS & MEANS, INC., a corporation
and LABCON, INC., a corporation,
*Petitioners,*

vs.

IVAC CORPORATION, a corporation,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

### STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

Section 3 of the Clayton Act, 15 U.S.C. § 14:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.
>
> Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

Section 4 of the Clayton Act, 15 U.S.C. § 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.
>
> Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

## REASONS FOR NOT GRANTING THE WRIT

The Petition should not be granted because there is no conflict between the decisions of the courts below and any

Court of Appeals of a different Circuit, and there is no federal question presented which has not already been decided by this Court.

No case or secondary authority has ever suggested that there could be an illegal tie where there is no express tie and 25% of the alleged tying product is sold outright and there is a reasonable explanation of combination acquisitions.

The following cases cited by petitioners all involved express ties.

*Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969)

*International Salt Co. v. United States*, 332 U.S. 392 (1947)

*Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958)

*Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953)

*United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922)

*United States v. Loew's, Inc.*, 371 U.S. 38 (1962)

*Hill v. A-T-O, Inc.*, 535 F.2d 1349 (2d Cir. 1976)

*Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977)

*Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971.)

The only case cited in the petition involving a practical, or sub rosa, tie is *Advance Business Systems & Supply Co. v. SCM Corp.*, 415 F.2d 55 (4th Cir. 1969). But in that case the tying product was never leased and its sales without tying were insignificant. Moreover, no reason was presented to explain why a customer would accept the package other than because it was imposed by the defendant in misuse of its market power. In the instant case a reasonable basis was found to explain why customers chose the package.

The foregoing classification of every tying case cited in the petition demonstrates that the instant case creates no conflict within or among circuits.

This case is obviously consistent with the statement in *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1 (1958):

> "Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price." 356 U.S. at 6, n. 4.

## STATEMENT OF FACTS

For our statement of facts we adopt the following portion of the District Court opinion (footnotes and citations omitted):

> "This case tests the propriety of certain marketing devices employed in a relatively new area of the health care industry by defendant, IVAC Corporation ("IVAC"), a Delaware corporation based in San Diego, California, which manufactures and sells electronic thermometers. These instruments, described in more detail below, record human temperatures through use of a temperature-sensitive probe sheathed in a

disposable plastic probe cover. Since 1971, IVAC has marketed its thermometer through a program by which hospitals essentially lease, for a monthly fee, a complete temperature-taking system, including thermometers, probe covers, and all other necessary accessories. Throughout the period from 1971 to the present, defendant's thermometers have also been available for purchase or lease outside the program.

"Plaintiff Ways & Means, Inc. ("Ways and Means"), a California corporation, manufactures probe covers compatible with IVAC's thermometers, and competes with IVAC in the sale thereof. These products are marketed through plaintiff Labcon, Inc. ("Labcon"), a wholly-owned subsidiary of Ways & Means. In this action, plaintiffs contend that IVAC's marketing program constitutes an unlawful tying arrangement in violation of the Clayton Act, and that through its use, IVAC has restrained trade and attempted to monopolize the market for probe covers, all in violation of Sections 1 and 2 of the Sherman Act. The matter is presently before the Court on cross-motions for summary judgment. For the reasons hereinafter set forth, the Court, finding there to exist no genuine issue as to any fact material to the disposition of this case, enters judgment for the defendant.

I.

"IVAC first developed its electronic thermometer in 1969. This product is a small, portable unit which utilizes battery-powered subminiature electronic components to provide a digital temperature display. The thermometer is attached by a flexible cord to a temperature-sensitive probe which is enclosed in a plastic

probe cover. The disposable plastic probe cover eliminates the need for sterilization between uses, since a separate probe cover is used for each temperature taken. IVAC has obtained a variety of patents on these products.

"IVAC began to sell its product in 1970. Initially, a traditional marketing approach was utilized: thermometers were sold outright to hospitals, which paid one price for each thermometer, and separate prices for probe covers and other accessories necessary to operate the system. According to IVAC, this approach met with several objections from hospital administrators, who feared that the units would rapidly become obsolete through new development, who voiced concerns over the ability of nurses to operate the thermometers, and whose capital budgets could not easily accommodate the purchase of such expensive equipment.

"In response to these problems, IVAC introduced, in 1971, a new marketing approach called the "Temperature System Program," or "TSP." Under TSP, IVAC provided hospitals with an entire temperature-taking system, including thermometers, probe covers, other accessories, in-service training for hospital personnel, and maintenance. Users agreed to purchase 15,000 probe covers for each thermometer provided, and were billed on a monthly basis. The system was available for one or two-year periods and, for a premium rate, a thirty-day cancellation option was included. Such a program eased the fears of obsolescence, facilitated the introduction of the devices into hospital routine, and, because probe covers were purchased with operating funds, avoided the need for capital outlays in the acquisition of thermometers.

"The TSP program was apparently successful, and has remained in use since its introduction. But although the TSP has been the principal vehicle through which IVAC has marketed electronic thermometers and probe covers, it has never been the *exclusive* means of acquiring either product. Electronic thermometers have also been available for purchase or lease throughout the period in question. Indeed, plaintiffs concede that defendant has never refused to sell thermometers outside the TSP program. And it is clear that since 1971, a substantial percentage—perhaps 25%—of defendant's sales of thermometers have been through the direct sale of units to hospitals, outside the TSP program. Moreover, a small but not insignificant number of units have been leased during the period, apart from TSP.

"The complaint was filed on September 20, 1976, alleging in essence that defendant's TSP program constituted a tying arrangement in violation of the Sherman and Clayton Acts, and that defendant had sought to monopolize the probe cover market through utilization of this arrangement. In March, 1978, cross-motions for summary judgment were made. Plaintiffs asserted that, as a matter of law, the undisputed facts disclosed the existence of an unlawful tying arrangement. Defendant urged three grounds for its motion: (1) that because the thermometers and probe covers are separately available to customers, the TSP program cannot be held to be a tying arrangement; (2) that there exists a "crucial relationship" between the thermometers and the probe covers which justifies their sale as a package; and (3) that plaintiffs failed to produce any evidence from which to infer that they had been injured by the TSP program. These motions were denied on April 21, 1978.

"In November, 1978, immediately prior to trial, plaintiffs moved for a ruling on the admissibility of a 'damage study' which purported to document the damages they had suffered. At that time, the cross-motions for summary judgment were renewed, and oral argument was heard. The Court found the damage study to be inadmissible for the reasons stated below. Further, having reconsidered its earlier rulings on the cross-motions for summary judgment, the Court now finds summary judgment appropriate based upon the first and third grounds asserted by the defendant, which are discussed *seriatim*."

## ARGUMENT

### A. NO BASIS EXISTS FOR GRANTING CERTIORARI

The decisions of the courts below are consistent with those of the other Circuits and of this Court and present no new question of federal significance compelling a decision of this Court. Petitioners have misread decisions from other Circuits and have misinterpreted existing law and misconstrued the facts of this case.

#### 1. The TSP program is not an actual tie

Petitioners argued in the district court that the TSP program was an actual tying arrangement illegal *per se*. On the basis of their own admissions that respondent has always been willing to sell its thermometer outright to customers whether the customers also used IVAC's probe covers, the district court held the claim insufficient as a matter of law. Petitioners have apparently abandoned this argument.

**2. Nor is the TSP program a sub rosa tie**

Petitioners now argue that although the customer can purchase IVAC thermometers separately from probe covers, the cost is so much higher that the buyer's only rational alternative is to buy the tied package. But, as the district court said, the "most glaring" and "undisputed" fact that approximately 25% of all IVAC thermometers were placed outside the TSP program "suggests that, *a fortiori,* separate purchase of thermometers and probe covers was a reasonable alternative" *Ways & Means, Inc. v. IVAC Corp.,* 506 F.Supp. 697, 702 (N.D.Cal. 1979), hereinafter *"Ways & Means"*. In fact, Ways & Means' chief executive officer was told by a potential customer that the latter had refused to adopt the TSP program, even when urged to do so by IVAC officers, because it was cheaper to get the components separately.

Petitioner's Brief (p. 11) is therefore incorrect in asserting that the Court of Appeals adopted "the District Court's theory that a tie-in is justified if some customers reject the tie." There was no express tie; not "some," but 25%, of the customers rejected the TSP package.

Petitioners submitted below a plethora of calculations purporting to show that the TSP program is the only economically feasible way of obtaining the use of the IVAC thermometer. But even if these calculations were accurate, they are totally irrelevant: they show at best that a price differential exists between various packages of all-IVAC components, only if the equity value of the thermometer is totally ignored.

Petitioners asserted that customers would have bought their probe covers but for the alleged tie, although there is no evidence of sales to those customers who acquired the thermometer outright. They also admit that the use of the IVAC thermometer has never been conditioned on the purchase of IVAC probe covers. Clearly, the most desirable alternative, from petitioners' point of view, is the use of *petitioners'* probe covers in conjunction with IVAC thermometers. Indeed, this is the theory behind petitioners' damage study, and the basis upon which they projected future profits. Not only has this alternative always been open; it is the cheapest alternative of all.

The District Court compared the cost per year, for a constant volume of probe covers, of (1) the TSP package, (2) purchasing the IVAC thermometer and probe covers, and (3) purchasing the IVAC thermometer and petitioners' probe covers (*Ways & Means* at 702 n.9). It held:

> "As the table graphically illustrates, a customer wishing to economize would purchase a thermometer from defendant and probe covers from plaintiffs—this is the least expensive arrangement. Were defendant attempting to create a tying situation through pricing policy, the purchase price of the tying product—electronic thermometers—would be established at a figure so high that cost savings via separate purchases would not be possible."* (*Id.*)

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*Petitioners assert that customers who want to use IVAC thermometers under arrangements other than TSP are saddled with the additional cost of accessory equipment and repairs. The figure for the amortized cost of the IVAC thermometer used in these calculations included the cost of accessory equipment (C.T. 373, Ex. 6). In any case, this additional cost would be incurred whether a customer bought probe covers from IVAC or from plaintiffs.

Petitioner's Brief (page 10, n. 2) is incorrect in stating that the Court of Appeals rejected the pricing analysis of the District Court. The Court of Appeals held that "Ways & Means has failed to demonstrate that the figures used by the District Court below are incorrect." *Ways & Means, Inc. v. IVAC*, 638 F.2d 143 (9th Cir. 1981)

The law declares certain ties illegal in order to protect buyers from being forced to take an unwanted tied product or to ensure that a competitor is not foreclosed from selling its substitute for the tied product. Such protection is clearly unnecessary here. Petitioners could have sold their probe covers to the 25% of all customers who bought the IVAC thermometer outright, or could have purchased IVAC thermometers themselves and leased them to customers for use with their own probe covers. Perhaps they made no attempt to calculate the total cost of these alternatives, because the attractiveness of these options might have underscored their failure to produce evidence that they made any sales in the admittedly unrestrained market.

Petitioners' reliance on *Advance Business Systems v. SCM Corp.*, 287 F.Supp. 143 (D.Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (hereinafter *"SCM"*) is misplaced. In *SCM* the tying product, a copier, had never been leased (415 F.2d at 62) and only an extremely small number had actually been sold at $4,250 (compared to a price of $0.035 per copy) (*id.*, 287 F.Supp. at 152-156). In this case, IVAC's terms for outright sale or leasing are proved reasonable by market acceptance and price analysis. In addition, *SCM* was a case where the acceptance of the burdensome terms of the package could only be attributed to an abuse of market power because

no other explanation was presented. In the instant case the issue was not market power, but whether a tie existed. Moreover, the terms of the TSP package were not burdensome because the customers could buy the IVAC thermometer and Petitioner's probe covers more economically than they could the TSP package (*Ways & Means* at 702 n.9). In the instant case there also exists a reasonable explanation for the customer's acceptance of the package. It gave the customer the ability to minimize obsolescence, obtain a complete temperature-taking system, and to pay for the system out of operating funds rather than scarce capital funds. Furthermore, *SCM* involved other forms of misconduct not present here, such as misrepresentation, industrial sabotage, and refusals to deal. (*See Ways & Means* at 703).

### 3. Offering components in a package is not equivalent to a tie

The mere fact that the IVAC thermometer and probe covers are sold together is not an indication that a tie exists. In *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211 (3d Cir. 1976), *cert. denied*, 429 U.S. 823 (1976) (hereinafter *"Dunkin' Donuts"*), the court observed:

> "Establishing that buyers purchase products A and B from the seller does not establish that the seller ties the sale of product A to the purchase of Product B. It merely establishes that buyers purchase products A and B from the seller. [Citations omitted.]" (*Id.* at 1225)

> *"It is only when the buyer's freedom to choose a given product is restricted that the tying doctrine comes into play: . . ."* (*Id.* at 1226.) (Emphasis added.)

The antitrust laws do not force a manufacturer to deal in the minimum product that could be sold or is usually sold (*United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545, 559 (E.D.Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961)). As the Ninth Circuit has warned in *Moore v. Jas. H. Matthews & Co.*, 550 F.2d 1207 (9th Cir. 1977) (hereinafter "*Moore*"):

> "Hypothetically one might ask whether the sale of the left shoe with the right shoe is an illegal tying arrangement. Such hypotheticals are useful because they demonstrate that the rules dealing harshly with tie-ins are designed not to prohibit the sale of 'physically separable objects, but rather . . . [to prohibit] the use of a dominant desired product to compel the purchase of a second, distinct commodity.' [Citations omitted.]" (550 F.2d at 1214.)

**4. The fact that many customers have chosen the TSP package does not prove that a tie exists**

The popularity of the TSP program is not indicative of a tie. The Supreme Court stated in *United States Steel v. Fortner Enterprises*, 429 U.S. 610 (1977) (hereinafter "*Fortner II*"), that this approach (which was taken in the *SCM* case),

> ". . . depends on the absence of other explanations for the willingness of buyers to purchase the package." (429 U.S. at 618 n.10.)

The Court explained that in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 7-8 (1958) (hereinafter "*Northern Pacific*"), consumers had been forced to yield their freedom to deal with defendant's competitors in order to obtain desired land from defendant, and there was no evidence that

the forced dealings with defendant would have been cheaper if the restriction had been omitted.

Petitioners are correct that the Ninth Circuit in *Moore, supra,* which was decided after *Fortner II,* stated that coercion might be implied if an appreciable number of customers accepted *burdensome* terms (550 F.2d at 1217). But *Moore* is inapplicable.

Firstly, the consumers in *Moore* were not given the choice of acquiring the components of the ties separately, as is the case here. The fact that the TSP program is not the only or cheapest means of obtaining the use of the IVAC thermometer makes it apparent that those who *do* choose the TSP program commit themselves to the package voluntarily.

Secondly, the tying product in *Moore* was cemetery land, a limited commodity uniquely desirable to survivors who wanted proximity to their dead. Customers in this case have a wide choice between electronic thermometers of different brands and glass thermometers. Hence, *Moore* is distinguishable from this case for the same reason that *Northern Pacific* was distinguishable from *Fortner II.*

Thirdly, perfectly logical reasons exist for customer preference of the TSP program. The TSP program was a marketing program expressly tailored to their needs when IVAC had to meet their preference for glass thermometers.

### 5. The existence of patents on the IVAC thermometer does not warrant a presumption of anticompetitive consequences because no actual tie exists

Petitioners have cited no case holding that a patentee which does not actually tie its patented product to an un-

wanted product unlawfully extends it legal monopoly simply because it offers the patented product in a package with another product. A reading of *United States v. Loew's, Inc.*, 371 U.S. 38 (1962) (hereinafter *"Loew's"*) demonstrates that petitioners have misapplied its holding on patents.

The *Loew's* defendants had been charged with forcing low-quality films on television stations by tying them in a package with desired films. Defendants did not challenge the trial court's finding that defendants had block-booked these films (371 U.S. at 47). Furthermore, the record also showed that particular television stations had asked to select the films they wanted but had been turned down (*id.* at 41-43). As the Court stated, the case raised the question of whether *"specific* tying arrangements violate § 1 of the Sherman Act." (*id.* at 44, emphasis added).

The Court analogized the copyrighted feature films to patented products, and found the block-booking practices illegal. While it agreed with the government that the defendants should be required to quote specific individual prices for feature films upon request, it held that such a requirement *would not preclude defendants from making simultaneous package offers* (371 U.S. at 53, citing *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948)).*

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*Petitioners mention in passing the case of *International Salt Co. v. United States*, 332 U.S. 392 (1947). That case, which also involved an actual tie, is distinguishable. Lessees of defendant's machines were required to buy *all* their salt requirements from defendant (*id.* at 394), or at least to give defendant priority on sales of salt if a competitor offered lower prices which defendant could meet (*id.* at 396-97).

## B. PLAINTIFFS HAVE FAILED TO SHOW THAT IVAC HAS FORECLOSED ANY AMOUNT OF COMMERCE IN DISPOSABLE PROBE COVERS

All the cases cited by plaintiffs in arguing that IVAC has "foreclosed" a "not insubstantial" amount of commerce in probe covers were *actual tie* cases. Under the circumstances of such cases, sales in the tied product are equivalent to sales foreclosed to a plaintiff. But here customers have a real choice between buying probe covers separately (from petitioners or respondent), or to obtain them under the TSP program. The fact that many customers prefer the TSP program does not establish a tie or a resulting foreclosure (*Dunkin' Donuts, supra,* 531 F.2d at 1225, 1226). Even petitioners do not deny that they could have sold probe covers to the 25% of IVAC customers who bought the thermometer outright. Petitioners could also have bought IVAC thermometers and sold them with their own probe covers. The TSP program thus had no foreclosure effect at all.

Petitioners refer to a statement taken from IVAC's 1971 Annual Report, which was signed on March 16, 1972. From this statement, it is clear that the competition referred to was competition *in glass thermometers.* There is no evidence that as of March, 1972, there were other manufacturers making probe covers to fit IVAC thermometers, and petitioners themselves did not begin making such thermometers until early 1973. At the time that the statement was made, therefore, petitioners could not have been injured even if IVAC *had* intended to eliminate third parties through anticompetitive practices. Hence, this point would

not have buttressed their argument against summary judgment (*Dahl, Inc. v. Roy Cooper Co.*, 448 F.2d 17, 20 (9th Cir. 1971)).

## CONCLUSION

The petition should not be granted because the decisions below merely applied existing law to undisputed facts. No court has suggested that the Court of Appeals decision created a conflict among the circuits. That the decisions below were not innovative or unexpected is demonstrated by the lack of reference to them in periodicals. Likewise shepardizing the decisions reveals no comments, adverse or otherwise. For the reasons stated herein, the Petition should be denied.

Further, were the petition accepted on the question presented, a Supreme Court decision would not dispose of the case; the Court of Appeals did not reach the issues of injury and damages decided in favor of defendant in the district court.

Respectfully submitted,

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August 1981

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